No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.
Respondents.

On a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL PUBLIC LABOR RELATIONS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL ASSOCIATION OF STATE TREASURERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, AND ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL SUPPORTING PETITIONER

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BRIEF OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioner, the State of South Dakota, urging that this Court reverse the Supreme Court of South Dakota's decision.

INTEREST OF AMICI CURIAE

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or his counsel made a monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications,

professional development, and conferences, certification, assessment, and advocacy.

The National Association of State Treasurers seeks to provide advocacy and support that enables member states to pursue and administer sound financial policies and programs benefiting the citizens of the nation. Membership is comprised of all state treasurers or state finance officials with comparable responsibilities from the United States, its commonwealths, territories, and the District of Columbia. The private sector is represented through the Corporate Affiliate Program that was established to build professional relationships and foster cooperation between the public and private sectors.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts.

AASA, the School Superintendents Association, advocates for the highest quality public education for all students, and develops and supports school system leaders. Founded in 1865, AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. NAESP advocates for the support principals need to be successful 21st century leaders—to achieve the highest results for children, families, and communities. And, we support the continual development of our members—principals in many different stages of their careers—through benefits, and awards. All of our activities are designed to help principals and learning communities achieve desired results for every child. The mission of NAESP is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment for all children.

Founded in 1910, the Association of School Business Officials International (ASBO) is a nonprofit organization that, through its members and affiliates, represents approximately 30,000 school business professionals worldwide. ASBO International is committed to providing programs, services, and a global network that promote the highest standards in school business. Its members support student achievement through effective resource management in various areas ranging from finance and operations to food services and transportation.

SUMMARY OF ARGUMENT

State and local governments lost an estimated $26 billion in sales and use tax revenue in 2015 because they were unable to effectively collect owed taxes. The direct cause of this problem is simple to

identify: the Court's decisions in *Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), erected an unjustifiable tax advantage for retailers who lack a physical presence in the taxing State that, with the growth of online retail, has imposed a massive burden on state and local governments. Under *Quill*, States cannot require out-of-state merchants to collect and remit taxes on sales to consumers within the taxing State unless the out-of-state merchant has a physical presence in the State. Questionable when decided, *Quill* has continually produced the very harms it was intended to remedy.

The devastating effect on State and local economies is two-fold. First, the physical nexus requirement results in a loss of crucial revenue from owed taxes that State and local governments depend on to fund basic government functions. Second, it disadvantages in-state brick-and-mortar retailers, who do not have the same luxury of avoiding their sales and use tax collection and remittance responsibilities. To counter the deleterious effects of *Bellas Hess* and *Quill*, States have been on the forefront of legislative and regulatory remedies designed to capture owed sales and use tax revenue. Unfortunately, due to the narrow legal confines of *Bellas Hess* and *Quill*, these tailored remedies have been severely limited in practice, if not stymied entirely. With the *Bellas Hess* and *Quill* shackles removed, States would once again be the laboratories of democracy, creating policy that fits their respective sales and use tax revenue needs while establishing price parity for brick-and-mortar retailers.

Here, the South Dakota legislature enacted a law that requires out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either: (1) $100,000 worth of business; or, (2) 200 separate transactions. S.D. Codified Laws §§ 10-64-1 *et. seq.* (2016) That law is constitutionally appropriate under a reasonable interpretation of the Commerce Clause, but it violates the requirement set out in *Quill*.

The Court's decisions in *Bellas Hess* and *Quill* are anomalous. Instead of adhering to the Court's established Commerce Clause jurisprudence and utilizing the *Complete Auto* nexus inquiry that focuses on the connection of the taxed *transaction* to the state, the Court instead established a super-nexus that requires physical presence of the taxed *entity*. In today's digital economy, out-of-state merchants conduct billions of dollars-worth of business in states without ever establishing this physical presence. As a result, the Court's decision in *Quill* is devastating in the modern economy, as online sales expand at a rate of almost four times the rate of total retail sales.

This easily identifiable tax collection problem has a clear solution: overturning *Quill* and relying on this Court's traditional four-part test in *Complete Auto*. But even if the Court determines it must heighten the nexus requirement of *Complete Auto* to include a super-nexus, economic nexus can serve as an alternative to physical presence under *Complete Auto*'s first prong. Under this approach, out-of-state retailers with a substantial economic presence in a State should be required to remit taxes on sales within the taxing State. Determining the level of

economic activity sufficient to create an economic nexus should be left to the State legislatures, as this determination is a highly individualized and context-specific inquiry. *See W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994) (explaining that the Court's Commerce Clause jurisprudence invokes "a sensitive, case-by-case analysis of purposes and effects" when judging between the national interest and the interests of states to exercise their legitimate taxing powers).

Upholding the South Dakota legislation and overturning *Quill* ensures that out-of-state retailers who enjoy a significant business benefit from the taxing State also remit the same taxes as in-state retailers. Questionable when decided, it is time to give *Bellas Hess* and *Quill* the "complete burial" they justly deserve. *Quill Corp.*, 504 U.S. at 322 (White, J., dissenting).

ARGUMENT

I. *QUILL* DEPRIVES STATE AND LOCAL GOVERNMENTS OF CRUCIAL REVENUE STREAMS AND UNREASONABLY HINDERS THEIR ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED.

A. *Quill* wreaks havoc on State and local governments' ability to collect owed sales and use taxes.

To effectively raise revenue through taxation, State and local governments must be permitted to collect taxes that are owed. Sales and use taxes on the sale of goods either purchased or consumed in the State are essential to State and local government revenue streams. They typically range from five to

ten percent. *See, e.g.*, Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016* (Mar. 9, 2016).[2] "Sales tax" refers to a tax assessed on the sale of a product at the point of sale. It is typically collected and then remitted to the State by the merchant. However, *Quill* does not allow a State to require the collection and remittance of tax on a sale in which the seller sits in another State, and States have been forced to seek alternative methods for collecting this lost revenue, to little avail.

Under *Quill*, an out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales taxes. *Quill Corp.*, 504 U.S. at 315-16. States thus try alternate methods to capture the tax revenue from sales made to its residents from out-of-state sellers, and lower courts have been forced, over and over, to cabin *Quill* to its facts. This Court has never attempted to explain why sales-tax collection needs a different "nexus" rule from other kinds of taxes imposed on non-resident businesses, nor has it condemned laws that impose equal or potentially heavier burdens on interstate commerce without a physical presence. Instead, this Court has acquiesced through numerous lower-court cases that effectively upheld state laws "imposing regulatory and tax duties of comparable severity to sales and use tax collection duties." *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (collecting cases). And lower courts continue to hold that seemingly indistinguishable taxes—like a

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[2] Available at https://taxfoundation.org/state-and-local-sales-tax-rates-2016/.

"Corporate Activities Tax" on out-of-state retailers, calculated based on gross receipts from in-state sales—are not governed by *Quill* because they are not formally "sales taxes." *See, e.g., Crutchfield Corp.* v. *Testa*, 88 N.E.3d 900, 909-12 (Ohio 2016).[3]

Additionally, most States have enacted a "use tax"—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. *See* Sales Tax Institute, *What States Impose Sales/Use Tax*.[4] Sales and use taxes are complementary: a use

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[3] Over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their state. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota v. Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017), available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps. By 2011, for example, New York and over 20 other states had enacted some type of "Amazon legislation," designed to establish the nexus of an out-of-state vendor through the vendor's use of in-state, click-through advertisements. *See* Sylvia Dion, *Amazon Laws: The New Normal? Internet Sales Tax Law Update* (July 17, 2011), available at http://www.salestaxsupport.com/blogs/issues/internet-tax-ecommerce/are-amazon-laws-the-new-normal-an-update-on-internet-sales-tax-laws/. In Alabama, the Department of Revenue promulgated a regulation that out-of-state sellers who met certain activity requirements and whose sales of tangible personal property in Alabama exceeded $250,000 per year were deemed to have an economic nexus in Alabama for sales and use tax purposes. *See* Tax Insights, *Alabama Adopts Economic Sales and Use Tax Nexus Regulation* (Oct. 2015), available at https://www.pwc.com/us/en/state-local-tax/newsletters/salt-insights/alabama-adopts-economic-sales-and-use-tax-nexus-regulation.html. Other states, such as Colorado, have opted for notification and reporting requirements. *See* Colorado Dep't of Revenue, *Use Tax Notice and Reporting Requirements*, available at https://www.colorado.gov/pacific/tax/usetax.

[4] Available at http://www.salestaxinstitute.com/Sales_Tax_FAQs/ What_states_impose_sales_use_tax.

tax is not assessed on transactions where a sales tax has already been collected and remitted by the seller to the State. Because *Quill* prohibits States from requiring out-of-state sellers to collect sales taxes unless they have a physical nexus in the State, the reporting and remittance burden shifts from the seller to the consumer, who is generally unaware of this obligation. The result is a de facto "honor system" for purchases by consumers from out-of-state sellers that virtually no consumer honors. Use tax compliance by individual purchasers has been estimated to be somewhere between zero and five percent. *See* U.S. Government Accountability Office, *Sales Tax: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000).[5]

The effects of this obstructed revenue stream are severe. For most States, sales taxes account for about one-third of all revenue. *See* National Conference of State Legislatures (NCSL), *State Efforts to Collect Remote Sales Taxes* (Feb. 2014) (hereinafter NCSL, *State Efforts to Collect*).[6] In some States, the reliance is even more profound. South Dakota, for example, depends on the sales tax for over 63 percent of total tax collections. *South Dakota FY2018 Budget*;[7] *see also* Morgan Scarboro, *To What Extent Does Your State Rely on Sales*

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[5] Available at http://www.gao.gov/assets/240/230474.pdf.

[6] Available at http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf.

[7] Available at https://bfm.sd.gov/budget/rec18/SummaryBook_FY2018.pdf

Taxes? (Apr. 27, 2017).[8] As online sales grow, states that do not impose corporate or personal income tax, like South Dakota, will be forced to impose or raise new taxes at threat of their fiscal sovereignty.

The States' current inability to collect sales and use taxes from remote sales therefore stifles a vital source of support for State services related to public safety, infrastructure, education, and other government services. Public schools, for example, rely on state revenues from, among other sources, sales tax. *See* Center for Public Education, *Data First: How Much Money Does Our School District Receive from Federal, State, and Local Sources?*[9] To demonstrate, the National Center for Education Statistics reported that during the 2013-2014 school year, in 23 states, at least half of education revenues came from state governments. In South Dakota, where the percentage of educational revenues coming from the state is lower than in most other states, that percentage was still 31 percent. *South Dakota FY2018 Budget*;[10] *see also* National Center for Education Statistics, *Public School Revenue Sources* (March 2017).[11]

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[8] Available at https://taxfoundation.org/sales-taxes-percent-collections/.

[9] Available at http://www.data-first.org/data/how-much-money-does-our-school-district-receive-from-federal-state-and-local-sources/.

[10] Available at https://bfm.sd.gov/budget/rec18/SummaryBook_FY2018.pdf

[11] Available at https://nces.ed.gov/programs/coe/pdf/coe_cma.pdf.

States' inability to collect sales and use taxes also creates market distortions that further depress state sales and use tax revenues. The tax collection inequity creates a distinct disadvantage for the brick-and-mortar stores located within the State. Sellers have the advantage of not adding sales taxes to a customer's bill, and thus are able to sell their products at lower overall cost, even if the products themselves were sold for the same exact price. In-state merchants, on the other hand, are still required to collect and remit sales tax, and their prices necessarily reflect this. Because the remote retailer is not required to collect the tax, the total price that the consumer pays for an item purchased from the remote retailer will be up to 10% less than what the consumer would have to pay for the same item if he or she were to buy it from the in-state retailer, even if the advertised price is the same.

As a result, local economies and jobs suffer as consumers choose tax-free online shopping over the local mall. In 2017, retailers closed over 6,700 brick-and-mortar stores across the country; this total exceeds even the number of stores that closed during the 2008 financial crisis. *See* Keshia Hannam, *A Record Amount of Brick and Mortar Stores Will Close in 2017* (Oct. 26, 2017).[12] Each store closing reflects lost jobs and lost tax revenue opportunity on several levels.

This transition, of course, leads to depressed economic growth. In Arizona, for example, a study estimated that the economic loss impact of e-

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12 Available at http://fortune.com/2017/10/26/a-record-amount-of-brick-and-mortar-stores-will-close-in-2017/.

commerce on Arizona would "grow to as much as 8,679 jobs, $302.5 million in wages, and $841.1 million in economic activity" by 2015. *See* Elliott D. Pollack & Company, *Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona* (2012). [13] A different study estimated that Massachusetts lost approximately $387 million in state tax revenue in 2011; the study further estimated that in that same year, tax inequity cost Massachusetts almost 2,000 new jobs. *See The Impact of the Internet Sales Tax Disparity on Massachusetts Tax Revenues, Sales and Jobs*, Efairness.org (Nov. 13, 2012).[14]

Another study found that Ohio suffered a revenue shortfall of more than $200 million as a result of sales and use tax non-payment. *See* The Economics Center, *Economic Analysis of Tax Revenue from E-Commerce in Ohio* 1 (Oct. 2011).[15] The Ohio study further noted that, based on 2011 data, 11,000 direct retail jobs could be recaptured if tax parity were achieved between store retail and online retail. *Id.* In discussing the impact this has on local economies, the study also identified a decrease in commercial rent revenues as a secondary impact of the local stores' loss of revenue; this decrease in commercial rent revenue represented a $120 million decrease in

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[13] Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf.

[14] Available at http://www.efairness.org/pdf/internet-sales-mass.pdf.

[15] Available at http://www.efairness.org/pdf/economicscenter-study.pdf.

property value. *Id.* States with financial models built upon sales tax feel this depressed economic growth particularly acutely. For example, a study estimated that Tennessee would lose $456.1 million in sales tax revenue in 2011, resulting in 6,899 lost jobs, $297.4 million wages lost by households, and a $232 million decrease in consumer spending. *See* Younger Associates, *The Impact of Sales Tax Loss to E-Commerce in the State of Tennessee* (Sept. 2011).[16]

B. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent and expansive growth of e-commerce.

Remote sales—largely consisting of orders made online, over the phone, and through the mail—have increased considerably over the past several decades. When the Court decided *Quill*, e-commerce did not even exist. The first legitimate online sales transaction was not completed until 1994. *See* Marissa Fessenden, *What Was the First Thing Sold on the Internet?* (Nov. 30, 2015).[17] Today, online shopping is rampant; about 190 million U.S. consumers were expected to shop online in 2016. *See* Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016).[18]

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[16] Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/8ff4a98d-a85f-4d1e-8f56-24dd8e27891d.pdf.

[17] Available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/.

[18] Available at http://fortune.com/2016/06/08/online-shopping-increases/.

The expansion of e-commerce showed no signs of slowing down in 2017. The Census Bureau of the Department of Commerce reported that an estimated $115.3 billion in U.S. retail e-commerce sales were conducted in the third quarter of 2017. *Quarterly Retail E-Commerce Sales: 3rd Quarter 2017*, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Nov. 17, 2017, at 1.[19] This accounted for 8.4 percent of total sales, and it represented a 3.6 percent increase in e-commerce sales from the second quarter of 2017. During this period, total retail sales increased by only 1.1 percent. Further, the $115.3 billion in third quarter e-commerce sales represented a substantial 15.5 percent increase from the third quarter of 2016, compared to a 4.0 percent increase in total retail sales over the same period. *Id.* E-commerce sales are rapidly expanding at almost four times the rate of total retail sales. It is estimated that they will account for 17 percent of total U.S. retail sales within the next four years. *See* Matt Lindner, *E-Commerce is Expected to Grow to 17% of US Retail Sales by 2022* (Aug. 9, 2017).[20]

The effect of the States' inability to collect the taxes that are owed on these sales is impossible to overstate. Shuttered brick-and-mortar shops do not just mean lost sales tax revenue—they create lost

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[19] Available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. The estimated $115.3 billion in U.S. retail e-commerce was adjusted for seasonal variation, but it was not adjusted for price changes.

[20] Available at https://www.digitalcommerce360.com/2017/08/09/e-commerce-grow-17-us-retail-sales-2022/.

property tax revenues, distressed and blighted communities that further depress property values, and vacant lots that are more dependent on municipal resources of police and firefighting as they become nuisances. Communities also lose valuable partners in community civic life when these businesses fail because of the price disadvantage they face. They no longer can sponsor local youth sports, be a source of community leaders, or employ local residents.

Ultimately, the loss of revenue is crushing. In 2015, for example, uncollected U.S. sales and use taxes from remote sales were estimated to be almost $26 billion. Of this $26 billion, over $17 billion uncollected taxes were projected to be from electronic sales. *See* National Conference of State Legislatures (NCSL) & International Council of Shopping Centers (ICSC), *Uncollected Sales & Use Tax from Remote Sales: Revised Figures* (Mar. 2017). [21] The fundamental problem that *Quill* and *Bellas Hess* imposes on the States remains: States are unable to collect owed taxes, and their revenue streams significantly suffer as a result.

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[21] Available at http://www.efairness.org/files/Updated%20Sales%20Tax%20Loss%20Report.pdf.

II. ECONOMIC PRESENCE IS A NEXUS ALTERNATIVE TO PHYSICAL PRESENCE UNDER THE *COMPLETE AUTO* TEST THAT SATISFIES THE DEMANDS OF THE COMMERCE CLAUSE.

A. *Quill* incorrectly articulated a difference between the nexus requirements of the Due Process Clause and the Commerce Clause.

Two fundamental issues have led to the current *Quill* quagmire. First, *Quill* incorrectly determined that the nexus for Commerce Clause purposes was different from the nexus for Due Process purposes. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 311-13 (1992); Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U. L. REV. 1115, 1146 (2016). Second, the Court removed "activity" from the Commerce Clause nexus formulation. The artificial distinction between Commerce Clause nexus and Due Process nexus, coupled with a formalistic reliance on physical presence, left in its wake a flood of divergent state court opinions and uncertainty regarding the level of activity or presence that would satisfy the Commerce Clause. *See* Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 623 (2014) (hereinafter Handel, *A Conceptual Analysis*.

For the first time in state tax nexus jurisprudence, *Quill* articulated a difference between Due Process nexus and Commerce Clause nexus—a seller's physical presence in the state is not required for Due Process nexus, but it is required for Commerce Clause sales and use tax nexus. *See* Handel, *A Conceptual Analysis*; *see also Quill*, 504

U.S. at 325 (White, J., dissenting). The dubious distinction between the "nexus" requirements under the Due Process and Commerce Clauses resulted in a "bright-line" rule that has become opaque in the wake of technological advancement and the concomitant surge in Internet retail. Instead of giving *Bellas Hess* "the complete burial it justly deserve[d]", *Quill*, 504 U.S. at 322 (White, J., dissenting), *Quill* clung to outdated and formalistic notions of tax jurisdiction—notions that the Court had recently repudiated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). As Justice Kennedy observed, the *Quill* majority even acknowledged the prospect that its conclusion was wrong when the case was decided. *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring). *Quill*'s holding established safe harbor provisions for out-of-state retailers despite the fact that under the more recent and refined test elaborated in *Complete Auto*, "contemporary Commerce Clause jurisprudence might not dictate the same result." *Quill*, 430 U.S. at 311 (majority opinion).

The Court differentiated the nexus requirements by distinguishing the concerns and policies that animate the two standards. Due Process nexus, the Court stated, "concerns the fundamental fairness of governmental activity." *Quill*, 504 U.S. at 312. The Commerce Clause nexus requirement, on the other hand, is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* However, the Court failed to explain the doctrinal origins of this novel interpretation of the Commerce Clause and cited no

authority for this assertion. *Id.* at 325 (White, J., dissenting). Furthermore, the Court disregarded the fact that when the Court announced the *Complete Auto* four-part framework, its nexus requirement had its doctrinal antecedents in due process concerns. *See Complete Auto*, at 430 U.S. at 281-82, 285. Under *Complete Auto*, the nexus requirement is met if a tax "is applied to an *activity* with a substantial nexus with the taxing State." 430 U.S. at 279 (emphasis added). Of course, the applicable "activity" is selling a product or service to someone in the State.

The Court removed the word "activity" from the Commerce Clause nexus formulation in *Quill* in favor of a heightened standard based on the seller itself. The sole constitutional inquiry, the Court now concluded, was whether the corporation was physically present in the state, even if the agent's physical presence had nothing to do with the taxed activity. *See Nat'l Geographic Soc'y* v. *Cal. Bd. of Equalization*, 430 U.S. 551 (1977) (holding that the National Geographic Society was liable for use tax collection responsibilities in California even though its physical presence in the state was unrelated to its mail-order sales). Before *Quill*, the Court had never found sufficient a nexus for *due process* purposes, but an insufficient nexus under the Commerce Clause. *Quill*, 504 U.S. at 319 (Scalia, J., concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax."). *Quill* remains the anomaly, and the most appropriate resolution here is to simply apply the *Complete Auto* test as it was originally articulated.

B. Economic Nexus Satisfies the Demands of the Commerce Clause and Resolves All Concerns of Wayfair and Amici.

Even if a heightened nexus requirement was appropriate under the Commerce Clause, there is no relationship between the physical-presence/nexus rule that *Quill* created and retains and the Commerce Clause considerations that purportedly justify it. *Quill*, 504 U.S. at 327 (White, J., dissenting). Long gone are the days of the traveling salesman when it was appropriate to condition the imposition of a tax on physical presence. *Id.* In today's digital economy, physical presence frequently has very little to do with a transaction a State might seek to tax. These transactions include a range of different activities, and these activities encompass much more than mere "communication." *See id.* at 311 (majority opinion) (characterizing mail-order commerce as merely "communicat[ing] with customers in the State by mail or common carrier as part of a general interstate business."). Wire transfers of money involving billions of dollars occur every day; out-of-state sellers intentionally and specifically target individual consumers across many different states; purchasers place orders with the click of a button; sellers ship goods by air, road, and sea—all without leaving their places of business. *See id.* at 328 (White, J., dissenting).

Economic nexus laws like South Dakota's replace the now murky concept of physical presence with a new, easily perceptible bright line—it requires a substantial economic activity by the out-of-state retailer within the State to establish a nexus between the taxing State and the retailer sufficient

to warrant taxation. More specifically, economic nexus laws set bright-line sales thresholds in dollars, number of transactions, or both. Sellers that exceed these thresholds are required to collect legally due and payable sales tax. *See* Joe Crosby, *Economic Nexus is the Most Prevalent Type of Sales Tax Compliance Legislation This Year* (Jan. 27, 2017) (hereinafter Crosby, *Economic Nexus*). [22] South Dakota's legislation creates a tax obligation for retailers that conduct a substantial amount of business activity in the state: $100,000 worth of business or 200 separate transactions.

While the imposition of this tax obligation on remote sellers has the potential to affect interstate commerce by ending unfair discrimination in its favor, South Dakota has taken steps to address the concerns raised in *Quill* to ensure the impact does not become excessive in relation to the State's legitimate exercise of its taxing authority. It is critical to "remember, this is not a new tax, it is a due tax." *No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL). *Quill* prevents States from effectively collecting a tax that they are already owed. Forcing States to rely on residents to (1) be aware of and understand how the use tax laws work, (2) track out-of-state purchases, (3) note any purchases where the retailer did not collect sales tax so that the resident

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[22] Available at https://www.multistate.us/blog/economic-nexus-is-the-most-prevalent-type-of-sales-tax-compliance-legislation-this-year.

can (4) voluntarily self-report and pay a use tax is an ineffective and unrealistic collection plan. *See, e.g.*, Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179-80 (2016) (observing that many in-state consumers are "unaware of the reporting requirement and have failed to keep records of their purchases" and noting efforts made by States to simplify use tax reporting).

The majority of states that impose a sales tax have joined the Streamline Sales and Use Tax Agreement ("SST"), which has made the calculation, collection, and remittance of taxes owed simple for any seller. The SST States established common definitions and administrative procedures, and certified certain tax-compliance software providers that sellers could use—at no cost—in collecting and remitting sales taxes to the relevant States. Seven certified companies now offer software for compliance in the 24 SST States, and using that software is both entirely free to merchants and a complete defense to any errors in collection and remittance. *See* Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 State Tax Notes 571, 576-77 (Aug. 7, 2017). This agreement provides sellers with a database of tax rates for all jurisdictions levying taxes, and it relieves sellers from liability if there are errors in the database. As a practical matter, the SST Agreement has abated the undue burden concerns facing out-of-state sellers in all states where it has been adopted. Despite states' continued efforts to simplify their tax systems and facilitate easy tax collection, these efforts will

remain futile if *Quill* retains force and excuses out-of-state sellers from collecting and remitting their share of sales and use taxes.

Overturning *Quill* and ruling the South Dakota statute constitutionally appropriate does not fully address the level of economic presence that would be required to constitute "substantial nexus" under the Commerce Clause. But as Justice Brandeis once observed, states can serve as laboratories of democracy, and this issue is precisely the type of "novel social and economic experimen[t]" that States are equipped to handle. *See New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932).

Determination of each State's economic nexus standard is a highly individualized and context-specific inquiry that only each State's legislature is equipped to identify. However, this Court can provide guidance to States to aid their determination by recognizing that South Dakota's law comports with Commerce Clause requirements. Minimum transactional thresholds that establish significant economic presence are sound guideposts for any super-nexus requirement. At least seventeen other states have pursued similar courses. *See* Crosby, *Economic Nexus*. For instance, Alabama set a threshold of $250,000 retail sales, Indiana establishes economic nexus with retailers whose sales exceed $100,000 or 200 separate transactions, and Washington set a threshold requiring $10,000 of gross receipts. *See* Crosby, *Economic Nexus*; *see also* Tax Insights, *Alabama Adopts Economic Sales and Use Tax Nexus Regulation* (Oct. 2015)[23]; KPMG,

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[23] Available at https://www.pwc.com/us/en/state-local-

SALT Alert! 2017-14: Washington State: Sales and Use Tax Economic Nexus/Use Tax Notice Bill Enacted (July 13, 2017)[24].

The "economic nexus" approach that these States seek to employ guarantees that the retailer's relationship to the State is "substantial," based on a legally and economically meaningful measure.

In sum, South Dakota's legislation offers a concrete alternative to the physical-presence rule that this Court can endorse in its reconsideration of *Quill*. Coupled with the remaining prongs of the *Complete Auto* test, economic presence ensures that interstate commerce pays its fair share of state taxes without unduly burdening interstate commerce.

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tax/newsletters/salt-insights/alabama-adopts-economic-sales-and-use-tax-nexus-regulation.html.

[24] Available at https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/07/tnf-washington-july13-2017.pdf

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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